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88-1161

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

JAMES JOHN DORNHOFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL OF RECORD

January 12, 1989

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QUESTIONS PRESENTED

1. Whether the Court should resolve a conflict among the circuit courts of appeal regarding the issue of whether materials putatively protected by the First Amendment can be seized and introduced as evidence of "predisposition" to commit the crime of knowing receipt of child pornography even though those materials are not specifically named or described in a search warrant which is otherwise directed to specific alleged child pornography.

2. Whether the mailing of child pornography from one federal agent to another as part of a federal "sting" operation and the subsequent hand-carrying of that pornography by a postal carrier at the request of postal agents constitutes "mailing" or "interstate commerce" suffi-

cient to confer jurisdiction for the purposes of 18 U.S.C. § 2252, et seq.

LIST OF PARTIES

The parties to this proceeding are the defendant, James John Dornhofer, and the United States of America.

The same parties appeared in the proceedings below.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

JAMES JOHN DORNHOFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioner, James John Dornhofer, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit in the above-entitled proceeding on October 17, 1988. Rehearing was denied on November 14, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reported at 859 F.2d 1195 (4th Cir. 1988). It is also reprinted in the Appendix attached hereto, Page 23a.

JURISDICTION

Invoking federal jurisdiction under 18 U.S.C. §2252(a)(2), the United States indicted Dornhofer on September 17, 1987. He was tried before a jury in the United States District Court for the Eastern District of Virginia on November 23, 1987, and was convicted. On January 8, 1988, he was sentenced to two years' imprisonment, with the term of imprisonment suspended, and fined a total of $1050.00.

Upon Dornhofer's appeal, the United States Court of Appeals for the Fourth Circuit, on October 17, 1988, affirmed the

conviction. The Fourth Circuit denied Dornhofer's Petition for Rehearing and Suggestion for Rehearing En Banc on November 14, 1988.

This Court has jurisdiction to review the judgment of the Fourth Circuit under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are the First and Fourth amendments to the United States Constitution and 18 U.S.C. §2252. These are set forth in the Appendix hereto, Pages 45a-46a.

STATEMENT UNDER RULE 28.4(b)

Not applicable.

STATEMENT OF THE CASE

This Petition arises from a criminal conviction against James John Dornhofer on the charge that, on or about June 12, 1987, in the Eastern District of Virginia, Dornhofer did "willfully, knowingly and unlawfully receive visual depictions that were transported and shipped in interstate and foreign commerce and mail, the production of such visual depictions involved the use of minors engaging in sexually explicit conduct," in violation of Title 18, U.S.C. §2252(a)(2).

Course of Proceedings

Dornhofer was indicted and arraigned in the United States District Court for the Eastern District of Virginia.

Prior to trial, Dornhofer moved, pursuant to Rule 12(b)(3), Federal Rules of Criminal Procedure, to suppress all evi-

dence seized by the government during the search of the defendant's apartment based on the invalidity of the search warrant and the overbreadth of the search. The motion was denied.

A jury trial was held on November 23, 1987, before Judge Claude Hilton of the United States District Court for the Eastern District of Virginia. At the close of the government's case, Dornhofer moved for Judgment of Acquittal because insufficient evidence was introduced to prove use of the mails or interstate commerce. The District Court denied this motion. After the close of all evidence, Dornhofer again moved for a Judgment of Acquittal. Dornhofer's motion was denied again. Thereupon, the jury found Dornhofer guilty. On November 30, 1987, Dornhofer filed a post-trial motion for judgment of acquittal pursuant to Rule 29,

Federal Rules of Criminal Procedure. This motion was denied by the District Court on December 1, 1987.

On January 14, 1988, Dornhofer filed a timely notice of appeal in the United States District Court for the Eastern District of Virginia, Alexandria, Virginia. On October 17, 1988, after briefing and oral argument, the United States Court of Appeals for the Fourth Circuit affirmed the rulings of the District Court. Dornhofer submitted a motion for rehearing and suggestion for rehearing en banc in a timely fashion. Both of these motions were denied on November 14, 1988, although the Court of Appeals corrected certain facts in its decision concerning the mailings.

Statement of Facts

This case arises out of a government "sting operation" known as "Project Looking Glass," whereby the United States Postal Service, operating surreptitiously as the "Far Eastern Trading Company," solicited orders for child pornography. The materials the government sent in response to orders received from selected sting targets consisted of specially prepared compilations of seized child pornography, which are illegal under 18 U.S.C. §2251, et al.[1]

After obtaining Dornhofer's name as a potential customer from the United States Customs Service, Postal Inspector Mack, who is located in Newark, New Jersey,

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[1]While the Justice Department had announced that the purpose for the sting was to prosecute producers and purveyors of child pornography, Dornhofer, in fact, had no such background. The only child pornography found in Dornhofer's possession was the material sent him by postal inspectors.

wrote and mailed a solicitation letter to Dornhofer.[2] Dornhofer responded to Mack's solicitation by sending a request for a catalog. The Postal Service, posing as the Far Eastern Trading Company of St. Croix, Virgin Islands, sent him a catalog, and Dornhofer ordered two magazines. The only indication Dornhofer had about the contents of these magazines was their descriptions in the catalog.[3] In response to Dornhofer's order, a postal inspector in Newark, New Jersey, prepared an envelope, containing two magazines entitled "Lolita-

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[2]Dornhofer regularly acquired adult sexually explicit materials. His name was generated on a list by the Customs Service based on three prior seizures of adult pornography.

[3]The government has argued that the titles and other wording of the catalog demonstrated knowledge that the materials were illegal child pornography. The catalog itself was not, however, pornographic and it is the custom in pornography industry catalogs to exaggerate (or minimize in the case of age) the merchandise.

Sex" and "Children-Love", addressed it to Dornhofer, and applied a fictitious postmark from the Virgin Islands. These were not actual magazines, but compilations created by the Postal Service from previously seized materials. He then placed this mailing in a second envelope addressed to Postal Inspector Northrop in Washington, D.C. Upon receipt of the package from New Jersey, Inspector Northrop in Washington, D.C., obtained a warrant to search Dornhofer's Arlington, Virginia, apartment. The warrant authorized seizure of the following items:

(a) Various books, magazines, photographs, negatives, films and/or video cassettes depicting minors engaged in sexually explicit conduct as defined in 18 U.S.C. §2256 (hereafter, child pornography);

(b) Envelopes, letters and other correspondence, books, documents and records of any kind constituting orders to buy, or offers to sell, trade, barter, or distribute such child pornography.

In addition, any and all records reflecting the shipment of, billing for, or payment of orders to purchase or offers to sell, trade, barter or distribute such child pornography.

(c) Address books, mailing lists, supplier lists, mailing address labels, rubber address stamps, advertising brochures or materials, and all documents, equipment or records pertaining to the preparation, purchase or acquisition of names, lists and correspondence used in connection with the purchase, sale, trade or distribution of child pornography;

(d) Financial records of J. J. Dornhofer, including monthly savings and checking account statements, cancelled checks, deposit tickets and receipts for cashiers checks or money orders, telephone records, records of purchase of services and all other records relating to the receipt, distribution, sale, trade and purchase of child pornography.

On June 12, 1987, Inspector Northrop handed the envelope with the two magazines to fellow Postal Inspector Raymond C. Smith. Inspector Smith drove the package from Washington, D.C. to the Arlington,

Virginia, Annex Post Office and handed the package to the postal carrier who usually delivered Dornhofer's mail. The mail carrier then placed the envelope with the rest of Dornhofer's mail to be delivered that day. The envelope addressed to Dornhofer was never postmarked, cancelled or placed in a customary or usual receptacle or mailbox for the delivery of mail.

On June 12, 1987, five United States Postal Inspectors, including Inspector Smith and one Arlington County Police Officer, went to Dornhofer's apartment building and observed the envelope being placed in a locked mailbox in the lobby of Dornhofer's apartment building. At approximately 3:45 p.m. on June 12, 1987, Dornhofer entered his apartment building. He went to his mailbox, retrieved his mail, and went to his apartment on the seventh floor with his mail, as yet un-

opened. Postal inspectors confronted Dornhofer shortly thereafter, displayed the search warrant, and began their search.

As a result of a three-hour search of Dornhofer's apartment, the agents seized the two magazines which they had placed in Dornhofer's mailbox; two binders containing pictures of both clothed and naked persons of all ages but not containing pictures of children engaged in sexually explicit conduct; four paperback books with titles reflecting incestuous themes and suggestive drawings of adults on the covers; and numerous adult magazines with suggestive names (such as "Sweet Little Sixteen") which do not contain pictures of children engaged in sexually explicit conduct, but some of which contain pictures of adults engaged in sexually explicit conduct. While not child pornography,

these materials were seized by the postal inspectors because they thought the materials would be useful to prove that Dornhofer had a "predisposition" to purchase child pornography. They were admitted into evidence, over objection, for that purpose. No evidence was found in Dornhofer's apartment of any child pornography, other than the two items supplied by the Postal Service, nor was evidence found of trafficking, trading, or commercializing in child pornography.

REASONS FOR GRANTING THE WRIT

1. The first issue concerns whether the "plain view doctrine" authorizes the seizure of materials putatively protected by the First Amendment which are not delineated in the warrant. The Fourth and Ninth Circuits have resolved this issue differently and conflict. A related issue

is whether the fact that the protected materials are not contraband but rather thought by the agents to be potentially useful evidence of predisposition to commit the crime of ordering child pornography renders the seizure unlawful.

2. The second issue concerns manufactured jurisdiction. The child pornography seized by Dornhofer was never in the regular mails. The only mailing was a fabricated one by agents as part of the logistics of the "sting" operation. Does this supply requisite jurisdiction?

I.
THE SEIZURE OF NON-DELINEATED MATERIALS PUTATIVELY PROTECTED BY THE FIRST AMENDMENT VIOLATED DORNHOFER'S FOURTH AMENDMENT RIGHTS.

The materials taken from Dornhofer's home (described above), except for the two magazines containing child pornography supplied by the Postal Service, were not

specifically named nor even generally identified in the search warrant. In Maryland v. Macon, the Supreme Court held that warrants for the search and seizure of First Amendment protected materials must be drafted with "scrupulous exactitude." Macon, 472 U.S. 463, 468 (1985) (citing Stanford v. Texas, 379 U.S. 476, 485 (1965)). The Court went on in Stanford to say that "[a]s to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant." Stanford, 379 U.S. at 485 (quoting Marron v. United States, 275 U.S. 192 (1972)).

The Circuit Courts of Appeals are split over whether the seizure of First Amendment material not specifically named in the warrant can be seized. Here, on appeal, the Fourth Circuit held that executing officers could seize First Amend-

ment protected materials without a warrant. Op. at 7. In support, the court cites Anglin v. Director, Patuxent Institution, 439 F.2d 1342, 1346 (4th Cir. 1971), cert. denied, 404 U.S. 946 (1971).[4] Anglin, however, only permits the seizure of those items found during a search which investigating officers otherwise would have probable cause to seize in the course of an arrest. Anglin, 439 F.2d at 1346.

The Fourth Circuit's holding that "'[o]nce the privacy of the dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items they have dis-

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[4]The Fourth Circuit also relied on Andresen v. Maryland, 427 U.S. 463 (1976). Andresen has no relevance where First Amendment protected materials are seized. Business records or ledger books (as in Andresen) are not entitled to the same protection as the material seized in the immediate case. See Stanford v. Texas, 379 U.S. at 285, n. 16 (citing Marron v. United States, 275 U.S. at 198-199 (1972)).

covered in the process of a lawful search,'" is in direct conflict with the Ninth Circuit. In a case involving the breadth of the warrant and validity of the seizure for child pornographic materials, the Ninth Circuit held that the "plain view exception...cannot be used to search for or seize alleged obscenity or alleged child pornography that is unspecified in the warrant." United States v. Hale, 784 F.2d 1465, 1469 (9th Cir. 1986) (citing Lo-Ji Sales Inc. v. New York, 442 U.S. 319, 326, n. 5. (1979)).

The law is further unsettled as to whether the "plain view doctrine" can justify the seizure of First Amendment protected materials not as contraband, nor as direct evidence of a crime, but as "predisposition" evidence. In the immediate case, postal inspectors seized adult pornography (not illegal to possess) in order

to help the prosecuting attorney have a better case, in anticipation of Dornhofer's defense that possession of illegal materials supplied by the government was not purposeful but accidental upon the assumption that the catalogs were puffery. Such an expansive view of the plain view doctrine is not consistent with the First Amendment. In light of Hale, there is a conflict in the circuits which this Court should address.

II.
THE JURISDICTIONAL ELEMENTS THAT THE PORNOGRAPHIC MATERIAL BE IN INTERSTATE COMMERCE AND MAILED WAS NOT MET.

There is confusion in the Circuit Courts of Appeals as to when an item enters the mail or is in interstate commerce for the purpose of achieving federal jurisdiction. In the immediate case, the facts regarding the method by which

Dornhofer received the two magazines containing child pornography are undisputed. See Op. at 3-4. The Fourth Circuit examined these facts and summarily "conclude[d] that the child pornography was 'mailed' within the meaning of the statute." Op. at 5. The only support offered for its conclusion is that 18 U.S.C. §§1461 (obscenity statute) and 1341 (mail fraud statute) have been interpreted by the Ninth and Tenth Circuits,[5] respectively, "to include persons who use the mails to order the delivery of obscene materials." Op. at 5 (emphasis supplied). Both of these statutes, however, permit a conviction for "causing material to be mailed." The child pornography statute does not include similar language. When the Fourth Circuit was previously con-

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[5]United States v. Hurt, 795 F.2d 765 (9th Cir. 1986); United States v. Esch, 832 F.2d 531 (10th Cir. 1987).

fronted with a similar issue, it held that a conviction under the Hobbs Act requiring the use of the mails could only be sustained when the mail material entered the "regular stream of mail." United States v. Ferguson, 778 F.2d 1017, 1020 (4th Cir. 1985), cert. denied, 476 U.S. 1123 (1986). See also United States v. Herzig, 26 F.2d 487, 488 (S.D.N.Y. 1928) (holding that an item enters the regular stream of mail when it is "deposited in an authorized depository for mail matter"; i.e., in a mail box or mail chute provided by the government for public convenience).

Here there was no regular use of the mails or interstate commerce. The agent from New Jersey mailed the envelope containing the pornography in a second envelope to Washington, D.C., where it was driven into Virginia by a postal inspector and handed to a letter carrier for hand-

delivery. This is not in the regular stream of the mails nor is it in "interstate commerce"; at most it is manufactured jurisdiction.

CONCLUSION

For the reasons set forth above, Dornhofer respectfully submits that a writ of certiorari issue to review the decision of the Court of Appeals below.

Respectfully submitted,

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January 12, 1989

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL
	)	NO.
JAMES JOHN DORNHOFER,	)	87-244-A
	)	
Defendant.	)	

ORDER

This matter came before the Court on various motions of the defendant, and for reasons stated from the bench, it is hereby ORDERED:

(1) That all discovery has been resolved, except request to produce the government guidelines for the investigation, and that motion is DENIED.

(2) That the defendant's motion to suppress statements is DENIED.

(3) That the defendant's motion to suppress evidence is DENIED.

(4) That the defendant's motion to

suppress because of a defect in the warrant is DENIED.

(5) That the defendant's motion in limine is DENIED without prejudice to raise at the time of trial.

(6) That the defendant's motion to dismiss on due process grounds is DENIED.

(7) That the defendant's motion to dismiss on the constitutionality of the statute is DENIED.

(8) That the defendant's motion to suppress or return certain items received in evidence is DENIED, as all items are described in the warrant or are relevant to the issue of defendant's pre-disposition.

/s/CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 30, 1987

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, vs. JAMES JOHN DORNHOFER, Defendant.	Cr. No. 87-244-A

HEARING ON MOTIONS
[Excerpt: Page 22, Line 23
through Page 27, Line 18]

October 30, 1987

Before: Claude M. Hilton, Judge

APPEARANCES:

Henry Hudson, Counsel for the United States

John Grad and Michael Logan, Counsel for the Defendant

The defendant, James J. Dornhofer, in person

MR. LOGAN: Your Honor, our next argument involves the seizure of other materials which, I believe, I think there is an Inspector Smith has a bag of these things that I don't even think the Government can make any representation that they were child pornography, and that they were seized. Obviously by their seizure there was a direct violation of Stanford versus Texas. Even the Hale argument goes to that. These are articles that were constitutionally protected. They seized them pursuant to a warrant that said you can go in here and seize child pornography. What right did they have to go in there and seize anything else?

And that is the crux of all those cases, is that we are going to protect the rights of an individual to have printed materials in his apartment, and the Government just can't go in there and take

whatever they want. And that's what they did in this case. They went in there, they took the two magazines that they alleged they sent to him, and then they went through the whole apartment and they grabbed anything they wanted.

THE COURT: Well, once they find the pieces of material that constitute the crime, they can also take other evidence which would be a part of the prosecution for that crime, can they not?

MR. LOGAN: Not if it is First Amendment stuff they can't Your Honor. If they thought it was evidence, they should have gone back to the magistrate and said, we want to go back and get these other things, and been very specific about it.

But I think Stanford versus Texas is very clear, you just can't go in there grabbing other things. The possession of those things was legal. And to say that

these other things are evidence of this crime, what basis do we have to make that assumption? The only evidence that, it seems to me, that would be evidence that the person knowingly received child pornography was if child pornography was there. How can adult pornography be deemed to be evidence that you ordered child pornography without violating every First Amendment case? I think that has come down, and that's what I would say on that. I think that stuff has to come back.

And, Your Honor, if you want to go in camera and review this stuff, you know, I wish you would do that. But I don't even think the Government would allege any of these other things that were seized, First Amendment materials, were child pornography. And under the constitutional cases, Stanford, and they have recently upheld it again in Maryland versus Macon,

you have got to be specific and you can't go in there and just grab other things, regardless of whether it is evidence or not.

And I don't think that is evidence in this case. I think that is really straining logic to say that these other adult materials are evidence that you would order child pornography. I just can't see how you could draw that argument constitutionally.

MR. HUDSON: Your Honor, to the best of my knowledge, all the materials that were seized were either child pornography or appeared on their face to casual observation to be child pornography. And if this Court wishes to review these materials in camera, we will certainly make them available to the Court.

However, unlike the other cases that counsel argued as I distinguished earlier,

those are cases in which the search warrant affidavit gave them no guidance as to what would or would not be other evidentiary materials. They were seized under the broad category of other evidence of commission of the crime. Here we would argue that the materials that Inspector Smith seized were specifically within the ambit of the language of the items to be searched for; namely, materials that showed minors engaged in explicit sexual conduct. We allege that it falls within that.

And we are more than glad to display the material to the Court if it deems it to be appropriate. We have them here this morning.

THE COURT: Well, Mr. Logan, I am not particularly anxious to look at this stuff--

MR. LOGAN: If I could just proffer

one other thing.

THE COURT: Well, let me ask you something first. Suppose they are overboard in what they seized. And I don't know how many magazines they have got. If they got ten magazines, suppose they took two that I would look at and determine would not have been properly seized under this warrant. Where does that get us? But he gets those two magazines back.

MR. LOGAN: We get those two magazines back.

THE COURT: And you want me to review this stuff and see what you can get back right now as opposed to--

MR. LOGAN: Or you can rule that they just can't use it at trial. Your Honor, the other thing is that yesterday the defendant received from the U.S. Department of Justice the return of certain items that they had originally seized as being

obscene, and the Court ruled that they weren't. Basically what they were were descriptions of different types of magazines, including the pictures. And the pictures and the magazines in those materials are some of the stuff that they seized. We had a termination in a court in New York that that is not pornography. And it matches up, and we just get that back, and that's the stuff they are trying to keep. I think we are entitled to have it back.

I am definitely not trying to put you through something you don't want to do, but I don't want this stuff going into evidence. And I think we are entitled to have it back. I think it hits to the heart of the First Amendment. And I think that we have to insist that we should get this stuff back and it shouldn't be used in evidence under the rules.

And I would offer this into evidence, the letter from the Justice Department--

THE COURT: All right.

MR. LOGAN: --for the purposes of this hearing at least.

THE COURT: All right. When I take a recess, I will look at that material and--

MR. LOGAN: Could I just ask one thing, Your Honor? When you are looking at it, what determination is it trying to make? That it is pornographic, or that it is evidence of the case, in this case?

MR. HUDSON: I would argue the determination is whether or not if falls within the general language of the search warrant as issued by the magistrate in this case, that's what governs.

THE COURT: All right. Well, I will look at the material and then I will tell you the basis upon which I am making my ruling.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, vs. JAMES J. DORNHOFER, Defendant.	Cr. No. 87-244-A

TRIAL TRANSCRIPT
[Excerpt: Page 112, Line 7
through Page 115, Line 8]

November 23, 1987

Before: Claude M. Hilton, Judge

And a Jury

APPEARANCES:
James Sullivan, Counsel for the United States

John Grad, Michael Logan and Susan Smith, Counsel for the Defendant

The defendant, James J. Dornhofer, in person

MR GRAD: Your Honor, I move for judgment of acquittal for two reasons,

main reasons. First of all, the Government forgot to prove use of the mails. And they forgot to prove, similarly, interstate commerce. I was listening very carefully, Your Honor.

The only evidence about the mails that they had was that Mr. Northrop took the materials in his Washington office, put them in an envelope and drove over to Arlington where he handed them to a carrier who brought them to the post box. There is no testimony about franking, about postage, none of the things that constitutes taking things through the mails. There is no use of the mails. The only thing that happened was that he gave it to the carrier and said, put it in the box. That is not use of the mails, sir.

Second of all, there is no testimony about interstate commerce. I left the statute on my desk, Your Honor, but the

statute says that it has to be interstate or foreign commerce. There is absolutely no testimony-- It went from Arlington to Arlington. And Your Honor may recall that I cross-examined on that. Your Honor, that is an element of the offense, and there is absolutely no evidence and he didn't prove it. He forgot to prove it.

Secondly, Your Honor-- Should I go on to the next point?

THE COURT: Yes, go ahead.

MR. GRAD: There is no proof of knowing receipt, Your Honor. And there are two points. First of all, it is the same argument that I made on motions day a couple Fridays back which Your Honor said to save for the trial, and here it is. And that is that when he received that envelope, there is no evidence that this man knew it was going to be child pornography of the type, you know, of these young

children as opposed to something else.

The evidence before the Court right now is that he did do the catalog, there is no question about it, but he expected children in their, I am sorry, adults in their twenties or young girls in their twenties and above. There is no evidence that the man expected this.

Furthermore, since it came in an unmarked envelope that just said Far Eastern Trading Company, there is no way he could have known when he opened that envelope that there was in it child pornography.

Now, there is no question after he opened it and once he possessed it, that he could have known it, but there is no question at the time he received it he couldn't have known it was child pornography.

MR. SULLIVAN: Your Honor, as to the first point, the statute doesn't require

proof of interstate commerce. Even if it did, the Postal Inspectors are part of the U.S. mails. And there is evidence that it went from Newark, New Jersey to Agent Northrop, Inspector Northrop, and then over to Arlington. So, it is bounced around interstate. But there is no requirement of interstate commerce, simply that it be in the mails. And it was in the mails. The mailman had it. And the Postal Inspectors are part of the mails. And the post mark in St. Croix, that is another example of the evidence.

As to the knowing receipt, I think the fact that the defendant had received the catalog, seen the descriptions-- He had to see the descriptions in order to get those catalog numbers and that he ordered them. That is just part of the knowing, as well as the predisposition, the motive of having his own homemade

child erotica.

MR. LOGAN: Can we look at the statute? I think that it has to be very specific that it is interstate mails.

THE COURT: I think even if it does have to be interstate, I think there is sufficient evidence. The first witness on, Inspector Mack, testified that he had mailed it from New Jersey down here to this officer, who then took it over and mailed it--

MR. GRAD: I think the catalog, sir--

THE COURT: Delivered it in the mails. And as far as the question of knowingly receiving it, I think that there is ample evidence to make out a prima facie case. He filled out the order based on the description that has been placed into evidence and then received the materials.

So, on that basis your motion is

denied.

MR. GRAD: All right, sir.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	CRIMINAL
	:	LAW
vs.	:	No.
	:	87-244-A
JAMES JOHN DORNHOFER,	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION
FOR JUDGMENT OF ACQUITTAL

Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, defendant respectfully requests this court for Judgment of Acquittal based on the insufficiency of the evidence presented by the government in the above-captioned case. Counsel for the defendant made the identical motion at the close of the defendant's case and incorporates all arguments on motions made during the trial into this motion. Specifically, but not exclu-

sively, the government did not satisfy its burden of proving the following elements of the crime charged in the indictment derived from 18 U.S.C. Section 2252(2): knowing and willful receipt of child pornography; and entrance of child pornography into interstate commerce or the mails. Defendant waives oral argument on this motion and requests that, based on the record in this matter, his motion be granted.

Respectfully submitted,
JAMES JOHN DORNHOFER,
By Counsel

Motion denied based on
previous rulings from the
bench.

/s/Claude M. Hilton
U.S.D.J.
Dec. 1, 1987

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Docket No. CR 87-00244-A(01)

United States of America vs.

DEFENDANT JAMES JOHN DORNHOFER

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date - Month 01 Day 08 Year 88

COUNSEL - WITH COUNSEL John Grad, Esquire

PLEA - NOT GUILTY

FINDING & JUDGMENT - There being a verdict of _X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of Title 18 USC §2252(a)(2): receipt of child pornography transported in interstate and foreign commerce and mail.

SENTENCE OR PROBATION ORDER - The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged

and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years with execution of sentence suspended and defendant placed on supervised probation for two (2) years. A fine of $1000.00 is imposed.

SPECIAL CONDITIONS OF PROBATION

Special condition of probation is that defendant undergo therapy at the direction of the Probation Office. In addition, a special assessment of $50.00 is imposed pursuant to Title 18 §3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

SIGNED BY

_X_ U.S. District Judge Claude M. Hilton

January 8, 1988

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5518

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES JOHN DORNHOFER,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CR-87-244-A)

Argued July 27, 1988
Decided October 17, 1988

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

John David Grad (Michael P. Logan, Susan B. Smith, JOHN D GRAD & ASSOCIATES, on brief) for Appellant. Paul George Cassell, Special Assistant United States Attorney (Henry E. Hudson, United States Attorney, on brief), for Appellee.

WIDENER, Circuit Judge:

James John Dornhofer was convicted of receiving child pornography in violation of 18 U.S.C. Section 2252(a)(2). Dornhofer appeals, challenging federal jurisdiction, the validity of the government's search and seizure, the admissibility of predisposition evidence, the district court's refusal to give certain jury instructions, the legality of the government sting operation, and the admissibility of statements Dornhofer made during the government's search. Finding no error, we affirm.

This case arises out of a government sting operation known as Operation Looking Glass. The government set up a Hong Kong company known as Far Eastern Trade Company which solicited orders for child pornography from those suspected of being consumers of child pornography. The sting

operation targeted Dornhofer as a result of a U.S. Customs seizure of child pornography that was addressed to Dornhofer. Far Eastern sent a letter to Dornhofer offering to provide a catalog of pornographic materials involving children. Dornhofer responded. Far Eastern then sent a catalog of available child pornography. Dornhofer ordered Lolita Sex (MLS-04) and Children Love (MLC-05) from the catalog and enclosed a forty-five dollar check for payment. Lolita Sex was summarized in the catalog in graphic terms describing explicit sexual acts of girls "8 years up to 15 years in hard core action." Children Love was also described in explicit terms as [g]irls and boys from 4 years to 15 years in group sex orgies with adults." It advertised a description of a nine year old girl performing oral sex on an adult male. Responding to

Dornhofer's order, the materials were mailed to Dornhofer with a Virgin Islands postmark, the sting being operated out of the Virgin Islands to help make the pornography company more realistic. Mack had mailed them from New Jersey to Inspector Northrop of the Washington, D.C. division in an unsealed envelope, who had the pornography given to the regular letter carrier assigned to Dornhofer's route, who delivered them to Dornhofer's address. Dornhofer took the child pornography out of his mail box.

Inspector Northrop had earlier received an anticipatory search warrant, conditioned on his placing the child pornography in the mail. The government agents watched Dornhofer remove the material from his mail box and go to his apartment. A few minutes later, Dornhofer was seen leaving his apartment, and the

government agents introduced themselves and told him they had a search warrant. The agents entered Dornhofer's apartment. Dornhofer said that he had something that the agents wanted and that he wanted to give it to them then because it really upset him; he was speaking of Lolita Sex and Children Love. The agents found the child pornography in a drawer in Dornhofer's bedroom and seized it. They also found and seized evidence later offered to show predisposition, including a notebook made by Dornhofer that included pictures of nude children, four novels and several magazines discussed below.

At trial, Dornhofer's theory of defense was that his ordering of the child pornography was inadvertent. He testified that frequently catalogs offer child pornography but the offers are usually just exaggerated claims and actually the porno-

graphy is of adult models. He also claimed not to have read the catalog description of child pornography that he ordered. He was convicted, and filed a timely appeal.

Dornhofer challenges federal jurisdiction, arguing that the child pornography was never in the regular stream of the mail. All that 18 U.S.C. Section 2252(a)(2) requires is that a person knowingly receive child pornography "that has been transported or shipped in interstate or foreign commerce or mailed." The evidence established that the pornography order was mailed from the Virgin Islands' office to Inspector Mack in New Jersey. Inspector Mack, in New Jersey, mailed the pornography to Inspector Northrop of the Washington, D.C. division in an unsealed envelope. Inspector Northrop sealed the envelope and gave the pornography to In-

spector Smith, who gave it to the letter carrier normally assigned to the Arlington, Virginia route, which includes Dornhofer's address, who delivered it to that address. The letter carrier delivered the pornography to Dornhofer's mail box. Dornhofer took the pornography out of his mail box. We conclude that the child pornography was "mailed" within the meaning of the statute.[1]

---

[1]The Ninth Circuit interprets 18 U.S.C. Section 1461, the prohibition against knowingly using the mails to mail obscene matter, "to include persons who use the mails to order the delivery of obscene materials." United States v. Hurt, 795 F.2d 765, 769 (9th Cir. 1986) (emphasis in original). The Tenth Circuit interprets 18 U.S.C. Section 2251(a), which prohibits the participation of minors in the production of child pornography that will be mailed, to reach a person who acts in a way where it is "reasonably foreseeable that his activities will result in the use of the mail." United States v. Esch, 832 F.2d 531, 540 (10th Cir. 1987) cert. denied 56 U.S.L.W. 3683 (1988).

Dornhofer also contends that the government attempted to manufacture federal jurisdiction. We have just decided that question adversely to his contention in United States v. Goodwin, No. 88-5011, __ F.2d ____, slip op. at 9, n. 3 (4th Cir. 1988), and see no use in further discussion.

Defendant next contends that there were several problems with the legality of the search and seizure. He argues that anticipatory search warrants are unconstitutional and if not unconstitutional then improperly allowed in the present case. We recently upheld an anticipatory search warrant for child pornography in United States v. Goodwin, supra, slip op. at 7. We adopted the analysis of the Ninth Circuit in United States v. Hale, 784 F.2d 1465, 1468-89 (9th Cir. 1986), and held that an anticipatory warrant is permis-

sible "where the contraband to be seized 'is on a sure course to its destination, as in the mail...'" Goodwin, slip op. at 7, quoting United States v. Hale, 784 F.2d at 1468. In the present case, in the affidavit upon which the search warrant was issued, Inspector Northrop stated that he would place the contraband in the United States mail to be delivered to Dornhofer. The magistrate conditioned the validity of the search warrant on the contraband being so placed in the mail. When Northrop placed the contraband in the mail, the requirement of Goodwin that the contraband was on a sure course to its destination was met. We conclude the anticipatory search warrant in this case is valid.

Dornhofer also contends that the search warrant was overly broad on its face. He argues that it lacked constitutionally required specificity. The chal-

lenged warrant permitted the seizure of "[v]arious books, magazines, photographs, negatives, films and/or video cassettes depicting minors engaged in sexually explicit conduct as defined in 18 U.S.C. 2256." 18 U.S.C. Section 2255(2) defines sexually explicit conduct as: "actual or simulated-- (A) sexual intercourse, including genital-genital, oral-genital, or oral anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." We agree with the Ninth Circuit that when a warrant describes the sought for material "in the graphic terms of the statute on the sexual exploitation of children the...[material] is described with all the particularity necessary to satisfy the Fourth Amendment." United States v.

Wiegand, 812 F.2d 1239, 1243 (9th Cir. 1987), cert. denied, 56 U.S.L.W. 3246 (1987).[2]

Dornhofer also challenges the seizure of the predisposition evidence since it was not specifically mentioned in the warrant. However, we do not "read the search warrant as a constitutional strait jacket: that only those items particularly described in it may be seized without regard to the facts and circumstances of the particular case." Anglin v. Director, Patuxent Institution, 439 F.2d 1342, 1346 (4th Cir. 1971), cert. denied, 404 U.S. 946 (1971). "Once the privacy of the

---

[2]Defendant contents that the First Circuit expressly disagreed with Wiegand in United States v. Diamond, 820 F.2d 10, 12. (1st Cir. 1987) (en banc). We do not accept that analysis, however. Diamond held that the phrase "pre-pubescent children" was a constitutionally sufficient description, and did not reach the question of whether or not "minors" was insufficient.

dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items they have discovered in the process of lawful search." 439 F.2d at 1347. In Andresen v. Maryland, 427 U.S. 463 (1976), the Court approved the seizure of evidence not specifically mentioned in the search warrant. In Andresen, the warrant at issue authorized the seizure of documents related to a specific piece of real estate that was involved in an alleged fraud. The investigators also seized evidence of fraudulent dealings with other lots. The Court upheld the seizure of the evidence, concluding that the evidence could be used to show the defendant's intent and absence of mistake. In the case at bar, Dornhofer's notebook containing pictures of nude children, the four novels--Horny Balling Daughter, In Heat Daughter,

Daughter loves to Suck and The Family Comes Together, and the magazines Fifteen, Teenage Sex, Teenager, Sweet Little Sixteen, Teen Splitters, and Young and Naked, could be used to show Dornhofer's predisposition toward child pornography as well as his lack of mistake when he ordered the child pornography in question.

Dornhofer also challenges the admission of the predisposition evidence on relevancy grounds. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The fact that Dornhofer had a notebook containing pictures of nude children, novels dealing with incest, and magazines such as Fifteen, Sweet Little Sixteen and Young and Naked, makes Dorn-

hofer's claim that he ordered the child pornography by mistake less probable.

Dornhofer also asserts that, if relevant, the evidence still should have been excluded under Fed. R. Evid. 403. Rule 403 allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." The standard required to exclude relevant evidence is high. "We have stated previously that the possibly prejudicial effect of evidence can 'require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence'" United States v. Foretich, 846 F.2d 941, 945 (4th Cir. 1988), quoting United States v. Masters, 622 F.2d

83, 87 (4th Cir. 1980). In the case at hand, we do not think the district court abused its discretion in its determination that the probative value was not substantially outweighed by the danger of unfair prejudice.

Dornhofer contends that the district court erred when it refused to instruct the jury as to his theory of the case. As long as the instructions have an evidentiary foundation and are accurate statements of the law, the district court should include instructions "to instruct the jury in the defendant's theory of defense." United States v. Mitchell, 495 F.2d 285, 287-288 (4th Cir. 1974). Dornhofer's theory of defense was that he purchased the child pornography inadvertently. The district court instructed the jury that:

> the Government must prove beyond a reasonable doubt that, first,

> the defendant knowingly and willfully received a visual depiction of a minor.... An act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the work knowingly is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reason. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids.

We think that instruction adequately conveyed to the jury the law which supported Dornhofer's theory of defense. Dornhofer also desired several instructions on Stanley v. Georgia, 394 U.S. 557 (1969), that possession of obscenity in the home is constitutionally protected. The district court ruled that the issue was not before the jury and declined to give the instructions. We find no error in refusing to instruct the jury on law that was not relevant to the issues before the jury. Dornhofer was charged with knowingly re-

ceiving child pornography that was mailed, not with merely possessing it.

Dornhofer contends that Operation Looking Glass involved such overreaching by government officials that it violated due process. We recently rejected that due process defense as applied to another Operation Looking Glass-defendant in United States v. Goodwin, No. 88-5011, ___ F.2d ___ (4th Cir. 1988). Since the sting operation was not applied much differently to Dornhofer than it was to Goodwin, the due process argument fails here also.

We likewise reject Dornhofer's argument that the statements he made to the officers during the search of his apartment were inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966). Dornhofer was not then arrested and was not in custody. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

The judgment of conviction is accordingly

AFFIRMED.

APPENDIX G

FILED NOV 14, 1988

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-5518

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES JOHN DORNHOFER,

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition

for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

The petition for rehearing has called our attention to certain factual errors in the opinion which need correcting, but which do not affect the decision.

It is accordingly ADJUDGED and ORDERED that pages 3 and 4 of the slip opinion shall be, and they hereby are, replaced by pages 3 and 4 attached to this order.

With the concurrences of Judge Russell and Judge Hall.

/s/ H. E. Widener, Jr.
For the Court

APPENDIX H

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 16, 1988

TO: U.S. District Court for the Eastern District of Virginia at Alexandria

RE: 88-5518 US v. Dornhofer
CR-87-244-A

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL.
The certified judgment and original record on appeal are returned ONLY to the district court/agency.
Enclosures:

_x_ Opinion and Certified copy of the judgment

___ Bill of costs form

_x_ Original record on appeal consisting of
_1_ Volumes of pleadings
_2_ Volumes of transcripts
___ Volumes of exhibits
___ Volumes other
_3_ TOTAL VOLUMES

___ The record will be returned at a later date.

___ The record was never transmitted by the D/Ct.

___ Other _____

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Yours truly,
JOHN M. GREACEN
Clerk
By: /s/Dorenzo Moody
Deputy Clerk

Copies of this notice forwarded to:
John David Grad, Esq.
Paul George Cassell, Esq.
James Michael Sullivan, Esq.

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. Section 2252:

Section 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who--

(1) knowingly transports or ships in interstate or foreign com-

merce or mails any visual depiction, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

(As amended Pub.L. 99-500, Title I, Section 101(b) [Title VII, Section 704(b)], Oct. 18, 1986, 100 Stat. ----; Pub.L. 99-591, Title I, Section 101(b) [Title VII, Section 704(b)], Oct. 30, 1986, 100 Stat. 3341-75.)

(2)

No. 88-1161

FILED

MAR 15 1989

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES JOHN DORNHOFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

11 pp

QUESTIONS PRESENTED

1. Whether federal agents executing a lawful search warrant for child pornography properly seized books and magazines not covered by the warrant on the ground that those materials constituted evidence that petitioner had unlawfully received the materials that were the subject of the warrant.

2. Whether the evidence was sufficient to establish that the child pornography received by petitioner had been transported in interstate commerce or mailed.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1161

JAMES JOHN DORNHOFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23a-40a) is reported at 859 F.2d 1195.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1988. A petition for rehearing was denied on November 14, 1988 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on January 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted

of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2). He was placed on probation for two years and was fined $1,000.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 24a-27a). It showed that the government set up the Far Eastern Trade Company with a post office box in the Virgin Islands to solicit orders for child pornography from persons suspected of being consumers of such material. This sting operation targeted petitioner after the United States Customs Service seized some items of child pornography that were addressed to him. Far Eastern sent a letter to petitioner offering to provide a catalog of pornographic materials involving children. Petitioner responded, and Far Eastern forwarded the catalog. Petitioner then ordered *Lolita Sex* and *Children Love* from Far Eastern and enclosed a check for $45. Pet. App. 24a-25a.[1]

In response to petitioner's order, a postal inspector in New Jersey sent the pornographic materials in an unsealed envelope with a Virgin Islands postmark to Robert Northrop, a postal inspector in Washington, D.C. Northrop sealed the envelope and arranged for it to be delivered to petitioner by the letter carrier normally assigned to the Arlington, Virginia, route that includes petitioner's address. Pet. App. 25a-26a, 28a. Inspector Northrop also obtained an anticipatory search warrant for petitioner's residence, conditioned on Northrop's placing the child pornography in the mail. Government agents observed petitioner remove the material from his mail box

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[1] *Lolita Sex* was described in the catalog as depicting explicit sexual acts by girls between the ages of 8 and 15. *Children Love* was described as depicting "[girls] and boys from 4 years to 15 years in group orgies with adults." It was also advertised as depicting a nine-year-old girl performing oral sex on her father. Pet. App. 24a-25a.

and take it into his apartment. Shortly thereafter, the agents executed the search warrant and recovered the two child pornography magazines.

In the course of their search, government agents found and seized a notebook made by petitioner that included pictures of nude children as well as several novels and magazines featuring sexual activity by minors. Petitioner's theory of defense at trial was that he had ordered the two magazines that were the subjects of the search warrant without realizing that they contained child pornography. The notebook, the novels, and the other magazines seized from petitioner's apartment were offered by the government to rebut that defense by showing that petitioner intended to receive child pornography. Pet. App. 26a-27a, 34a-35a.

2. On appeal, petitioner challenged the seizure and admission into evidence of the notebook containing pictures of nude children and the novels and other magazines found in his apartment on the ground that their seizure was not specifically authorized by the search warrant. In rejecting that claim, the court of appeals relied (Pet. App. 34a) on this Court's holding in *Andresen* v. *Maryland*, 427 U.S. 463, 483 (1976), that police may seize evidence discovered in plain view in the course of executing a warrant where the evidence "will aid in a particular apprehension or conviction." The court found that the items in question here were properly seized as evidence of petitioner's "predisposition toward child pornography as well as his lack of mistake when he ordered the child pornography in question" (Pet. App. 35a).

The court of appeals also rejected petitioner's contention that the evidence at trial did not establish that the

child pornography had "been transported or shipped in interstate or foreign commerce or mailed," as required by 18 U.S.C. 2252(a)(2). After describing the course of the material from New Jersey to petitioner's mail box in Arlington, Virginia, the court concluded (Pet. App. 29a) that "the child pornography was 'mailed' within the meaning of the statute." In reliance on its previous opinion in *United States* v. *Goodwin*, 854 F.2d 33 (4th Cir. 1988), the court also rejected (Pet. App. 30a) petitioner's claim that federal jurisdiction had been artificially manufactured by the government.

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the government improperly seized the notebook containing pictures of nude children, as well as the novels and the other magazines found in his apartment, because those materials were not covered by the search warrant. Petitioner does not, however, dispute the general proposition that police may seize any item observed during the conduct of a lawful search when they have probable cause to believe that that item constitutes evidence of a crime. See, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321, 325-326 (1987); *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967). Nor does petitioner challenge the relevance of the materials at issue in this case as evidence of his predisposition and intent to receive child pornography. Rather, he argues that otherwise probative evidence discovered in plain view during the execution of a lawful warrant cannot be seized if the seizure would implicate First Amendment values. That proposition is untenable.

To be sure, the First Amendment does impose special constraints on searches for and seizures of allegedly obscene material. See, *e.g.*, *Maryland* v. *Macon*, 472 U.S.

463, 468 (1985). Thus, in *Roaden* v. *Kentucky*, 413 U.S. 496, 497 (1973), the Court held that, without a warrant, allegedly obscene material may not be seized incident to an arrest for the public exhibition of that material. And in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), the Court held that a warrant to seize allegedly obscene material must state with particularity the items to be seized and may not issue merely on the officer's conclusory assertion that the materials in question are obscene. Relying on these and other cases, the Ninth Circuit in *United States* v. *Hale*, 784 F.2d 1465, 1469, cert. denied, 479 U.S. 829 (1986), held that the plain view exception to the warrant requirement "cannot be used to * * * seize alleged obscenity or alleged child pornography that is unspecified in the warrant."[2]

The instant case, however, is not in direct conflict with the Ninth Circuit's decision in *Hale*. Unlike the materials in *Hale*, the materials at issue in this case were not subject to seizure solely because the officers believed they were obscene or constituted child pornography; rather, regard-

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[2] The Ninth Circuit relied principally on a footnote in this Court's opinion in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326 n.5 (1979). The Court said there that, although "contraband may be seized without a warrant under the 'plain view' doctrine[,] * * * we have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment * * *; materials normally may not be seized on the basis of alleged obscenity without a warrant." That footnote obviously was not intended to decide the question whether obscene materials can be seized under the plain view doctrine, because the Court in the accompanying text expressly stated that it had "no occasion to decide whether in this context the 'plain view' doctrine might be applicable" (*id.* at 326). *A fortiori*, the footnote in *Lo-Ji* does not address the question presented in this case: whether the plain view seizure is justified not simply to suppress allegedly obscene or pornographic materials, but because the evidence seized is relevant to a prosecution for the receipt of other, lawfully seized materials.

less of whether their possession or receipt independently violated the law, the materials seized in this case were subject to seizure because they were evidence of petitioner's unlawful intent with respect to the receipt of the materials identified in the warrant. See *Andresen* v. *Maryland*, 427 U.S. at 483. The Ninth Circuit in *Hale* was concerned (784 F.2d at 1469) that, if the plain view doctrine applied to allegedly obscene materials, "police officers could seize any publication or film they deem to be unprotected by the First Amendment, thereby subverting the higher procedural standards that require a neutral magistrate to make the initial determination of probable cause as to specific items." But, since this is not a case in which the postal inspectors used the plain view doctrine simply in order to suppress publications on the basis of the officers' judgment that they were obscene or constituted illegal child pornography, there is no occasion to apply the "particularized rules" governing such seizures. *Maryland* v. *Macon*, 472 U.S. at 468. To be sure, the Ninth Circuit in *Hale* did not limit its decision in recognition of the distinction we are suggesting here. Because the evidence in that case was seized solely because of its allegedly unlawful character, however, there was no occasion to consider whether the plain view seizure would have been justified if the evidence had been subject to seizure because of its probative value in a prosecution for the receipt of other materials that had already been found to be contraband.

The seizure of evidence relevant to intent and predisposition should not be subject to special restrictions under the Fourth Amendment whenever such evidence implicates First Amendment interests. Otherwise, police officers executing a search warrant for a bomb at a terrorist's home could not seize, in plain view, an engineering magazine that explained how to build explosive devices simply because the magazine itself would be presumptively

protected by the First Amendment. Petitioner cites no support for a proposition that is not only untenably broad but would also not serve any articulated First Amendment purpose.

2. Petitioner contends (Pet. 18-21) that the evidence failed to establish that the child pornography he received had been "transported or shipped in interstate or foreign commerce or mailed," as required by 18 U.S.C. 2252(a)(2). The government introduced evidence that a postal inspector in New Jersey mailed the two magazines to Inspector Northrop in Washington, D.C. Pet. App. 28a. Northrop prepared the package and arranged for it to be given to the letter carrier who normally delivered the mail to petitioner's residence in Arlington, Virginia. The carrier then placed the package in petitioner's mailbox, where petitioner retrieved it. This evidence was plainly sufficient to satisfy the jurisdictional requirement of 18 U.S.C. 2252(a)(2).[3]

Petitioner alternatively suggests (Pet. 21) that the postal inspectors artificially manufactured jurisdiction by placing the pornography in the mail. This is not, however, a case in which law enforcement officers performed wholly

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[3] Petitioner mistakenly relies on *United States* v. *Ferguson*, 778 F.2d 1017 (4th Cir. 1985), cert. denied, 476 U.S. 1123 (1986), to support his assertion (Pet. 20) that the pornography was never in the "regular stream of mail." In that case, two postal employees were convicted for opening parcels that had been planted by postal inspectors. The court held (778 F.2d at 1020) that the jury was properly instructed that it had to find that the defendants destroyed mail that was not directed to them, that a "test or decoy" parcel could be considered mail, and that the uncontradicted evidence was that the decoy parcel had been introduced into the "regular stream of mail." Here, the pornography entered the regular stream of the mail both when it was sent to Inspector Northrop and when it was turned over to the letter carrier for delivery to petitioner.

unnecessary actions in order to establish jurisdiction. Compare, *e.g.*, *United States* v. *Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), cert. denied, 479 U.S. 882 (1986); *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973). To the contrary, the use of the mail was a necessary element of the sting operation, since the postal inspectors could not convincingly have delivered these materials in person. Moreover, having ordered the materials from a mail order catalog with a Virgin Islands address, petitioner could hardly be surprised that the mail was used to deliver the materials to him. The use of the mail was a natural and inevitable part of the transaction, and by his own actions petitioner invited its use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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